UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., HOSPITAL OF BARSTOW, INC., d/b/a BARSTOW COMMUNITY HOSPITAL, WATSONVILLE HOSPITAL CORPORATION d/b/a WATSONVILLE COMMUNITY HOSPITAL and / or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and / or joint employers and QUORUM HEALTH CORPORATION and QHCCS, LLC, successor employers and NATIONAL NURSES ORGANIZING COMMITTEE (NNOC), CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC) and CALIFORNIA NURSES ASSOCIATION (CNA), NATIONAL NURSES UNITED	08-CA-167313, *et al*.

RESPONDENT HOSPITALS' REPLY TO OPPOSITIONS TO RENEWED AND MODIFIED MOTION BY RESPONDENTS CHSPSC, LLC AND COMMUNITY HEALTH SYSTEMS, INC. FOR CONSENT ORDER AND PARTIAL DISMISSAL

As Respondents in the above-captioned cases, DHSC, LLC formerly d/b/a Affinity Medical Center, Hospital of Barstow, Inc. d/b/a Barstow Community Hospital, Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center, Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center and Watsonville Hospital Corporation d/b/a Watsonville

Community Hospital (hereafter, collectively at times, the "Hospitals") hereby reply, by and through the Undersigned Counsel, to the Oppositions filed by the General Counsel and the Charging Party (hereafter, the "Union") to the Renewed and Modified Motion for Consent Order and for Partial Dismissal filed by Respondent CHSPSC, LLC and Community Health Systems, Inc.

BACKGROUND

On March 1, 2018, CHS, Inc. and CHSPSC, LLC (hereafter, for ease of reference, collectively, "CHS") filed with Your Honor a Renewed and Modified Motion for Consent Order and for Partial Dismissal (hereafter, the "Motion"). On March 20, 2018, Oppositions were filed by the General Counsel and the Union (hereafter, at times, the "GC Opposition" and the "Union Opposition," respectively). By an e-mail sent to the parties' attorneys on March 21, 2018, Your Honor authorized any party to file a Reply by April 4, 2018.

Although the Motion primarily affects CHS, for the reasons explained below, the Hospitals' interests are also implicated by the Motion, which the Hospitals now join and support by offering the following reply to the Oppositions.

ARGUMENT

Contrary to what the General Counsel may imply, UPMC did not create any standard of its own. Instead, as part of UPMC, the Board overruled United States Postal Service, 364 NLRB No. 116 (2016), and restored Independent Stave, 287 NLRB 740 (1987), as the analysis that governs the question of whether the Board should approve a party's offer to settle unfair labor practice allegations. Thus, even under the presumption, purely for the sake of argument, one or more material difference exists between UPMC and the proceedings now before Your Honor, the argument that these differences require Your Honor to reject the Consent Orders is a *non sequitur*. See GC Opposition, page 2 ("[t]he facts in the instant consolidated action . . . are distinguishable from UPMC and **thus require** a different result from that case") (emphasis added). The bottom line is that the proposed Consent Order should be approved or rejected based upon the Independent Stave analysis, whereby Your Honor must assess the "reasonableness" of the Consent Order.

The assessment of the reasonableness of any settlement should take account of "all factors present in the case to determine whether it will effectuate the purposes and policies of the Act to give effect to the settlement." 287 NLRB 740, 743 (1987). In each case, the relevant factors

will include: (1) whether the General Counsel objects to the settlement, (2) the nature of the alleged violations, the risks inherent in the litigation, and the stage of the proceedings, (3) whether any fraud, coercion, duress has taken place in connection with the settlement, and (4) whether the party who proffers the settlement has engaged in a history of violations of the Act or failed to comply with any settlement reached as part of any previous unfair labor practice proceeding. Id.

In the case here, for the reasons explained below, the Consent Order proffered by CHS is reasonable, and therefore, should be approved. Between CHS 1.0 and CHS 2.0, the parties have endured years of intense litigation, but more litigation, potentially, much more litigation, lies ahead. The Hospitals' managers and employees are fatigued, and for the sake of their noble work in support of patient care, should resume a normal workplace focus. The Consent Order presents an opportunity, which is uniquely available now, to obviate future litigation, which, as explained below, would be prejudicial to the Hospitals. Moreover, in spite of every effort by the General Counsel and the Union to question the efficacy of the resolution proposed by CHS, the value of the Consent Order is undeniable. Under Independent Stave, the Consent Order can and should be approved in spite of the fact CHS has not offered a corporate-wide remedy, which, as

explained below, is beyond the reach of the General Counsel and creates the risk of more litigation now and more litigation later. And finally, the General Counsel's ongoing and shameless efforts to mischaracterize the Hospitals' supposed "recidivism" misses the mark, yet again.

1.) The Ongoing Litigation Desired by the General Counsel and the Union Offers Virtually No Benefit and Subjects the Hospitals to Undue Prejudice

On December 2, 2015, Judge Mark Carissimi, as the Administrative Law Judge originally assigned to CHS 1.0 (Case Nos. 08-CA-117890, *et al*.), entered a Case Management Order that called for the end of all hearings, inclusive of those related to the single employer allegations, by June 2016. As matters have turned out, the hearings on the alleged unfair labor practices will not conclude before May 2018, nearly two (**2**) years beyond the end point originally envisioned for all hearings in the case, and hearings have not even been scheduled for the presentation of other evidence that may be necessary for the case (*e.g.*, evidence related to the single employer theory). Clearly, no one foresaw that nearly a two-year period would be necessary for the development of a record on the alleged unfair labor practices standing alone. In the case now before Your Honor, the hearings began roughly a year ago and the record on the alleged unfair labor practices is a long distance away from completion.

In any complex litigation, in spite of every effort to streamline the proceedings, one, simple fact of the matter remains – there are delays that are not only unforeseeable, but also unavoidable. In the litigation now before Judge Laws, aside from the time that has been necessary to present evidence and address the parties' disputes over the law and the facts, the proceedings have been delayed because of deaths that affected one party or another, sickness, car accidents and other freak happenings, witnesses' refusal to appear in response to subpoenas, failures of technology, and Mother Nature's adjustments to travel plans. Some of the same vagaries of litigation have affected the proceedings before Your Honor. Put simply, in any assessment of the risk inherent in a litigation, experience should not be forgotten, and in the litigation here, experience has made very clear that, no matter how careful the design and no matter how effective the execution, any measures to streamline the proceedings are ultimately at the mercy of the litigation itself.

Hearings on the single employer theory will, of course, only be necessary to the extent Your Honor determines that one or more of the Hospitals engaged in an unfair labor practice. Presumably, however, should Your Honor determine that even one unfair labor practice took place, the General Counsel will demand that full-fledged hearings be convened in

order for the parties to present their dueling evidence on the single employer theory. The Union's view would undoubtedly be the same. Any litigation over the single employer allegations would be, within its own four corners, an immense litigation.

As Your Honor probably recalls, the General Counsel and the Union served all of the Respondents with massive Subpoenas *Duces Tecum* related to the single employer allegations. These Subpoenas will surely breed numerous disputes before any hearing even convenes, and like UPMC, the disputes may escalate to the federal courts. When the hearings do commence, progress will likely be slow going. To one degree or another, each Hospital will likely have a need to question each witness called by the General Counsel, and similarly, each Hospital will likely present evidence of its own in defense of the single employer allegations. The Hospitals also presume that, given the nature of the allegations, the Union will actively participate in the hearings.[1]

[1] The possibility that Judge Laws may preside over a single employer hearing in the near future should not alter Your Honor's analysis under Independent Stave. As Your Honor may know already, CHS has presented Judge Laws with Consents Orders that, if approved, would lead to the dismissal of the single employer allegations in CHS 1.0. Put another way, there is a possibility, or as the point should be made under Independent Stave, a risk that a single employer hearing before Your Honor would be the occasion on which the parties unfurl the entirety of their evidence on the single employer dispute. Even in the event Judge Laws makes a single

Notably, hearings on the single employer allegations may not be the end of all hearings in the litigation. In particular, under the presumption, for the sake of argument, Your Honor determines that the Act has been violated in one way or the other and a single employer relationship was in place between CHS and one or more of the Hospitals, the General Counsel will request that Your Honor impose a corporate-wide remedy. See GC Opposition, page 4. In most cases, a remedy follows automatically based upon the nature of the unfair labor practice (*e.g.*, backpay and an offer of reinstatement for an unlawful termination) or the evidence that is necessary for the evaluation of a possible remedy may be pulled from the record on the alleged unfair labor practices (*e.g.*, an award of negotiation costs). The same is not true with a request for a corporate-wide remedy. As shown by the General Counsel's own summary of the case law, in order to prove a basis for such a remedy, the General Counsel must show, *inter alia*, the unlawful conduct has impacted employees at other workplaces. See GC Opposition, page 12. Presumably, the General Counsel would intend to offer evidence to prove, as a factual matter, that any unfair labor practice that took place at the Hospitals also affected employees at other workplaces that have some

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employer finding before Your Honor convenes a hearing on the allegation, the hearing will undoubtedly give rise to numerous disputes, nonetheless.

relationship with CHS, or alternatively, CHS may seek an opportunity to prove that the effect of any unfair labor practice was confined to the Hospitals' employees.

Hearings on the single employer allegations and hearings on the request for a corporate-wide remedy would subject the Hospitals to extreme costs and severe prejudice. The origin of the dispute between the Hospitals and the Union is a barrage of Unfair Labor Practice Charges that were filed by the Union in the Fall of 2013, and ultimately, adopted by the General Counsel *via* the Complaint issued in CHS 1.0. In each year that has gone by, the litigation has only grown in size. In September 2016, the General Counsel commenced the proceedings now before Your Honor, and a few days ago, the General Counsel formulated "CHS 3.0" by the issuance of a Consolidated Complaint that arises out of Unfair Labor Practice Charges that the Union recently pursued against Barstow. Case Nos. 31-CA-199679 and 31-CA-211144. "Extraordinary" would be a conservative description for the time that has already been taken out of the days of the Hospitals' respective managers and employees in order to attend to these legal proceedings, and in the absence of some reasonable management of the proceedings, there is no end in sight.

Any hearing on the single employer allegations or the corporate-wide remedy would not only require the Hospitals to continue to expend their resources, but would also subject the Hospitals to prejudice. As noted above, a hearing on the single employer allegations would necessarily be preceded by a finding on Your Honor's part that one or more unfair labor practice has taken place. In an ordinary case, once an Administrative Law Judge has concluded a party violated the Act, the party has the opportunity to pursue immediate review by the Board. In the case here, however, the Hospitals do not enjoy any such opportunity.[2] Instead, the Hospitals' opportunity to pursue review by the Board would be delayed for the period of time – the lengthy period of time – that would be necessary for hearings to be completed on the single employer allegations, and possibly, the corporate-wide remedy as well. The delay would be especially prejudicial for Affinity, Barstow and Watsonville, none of which have had any relationship with CHS since they were spun off roughly two years ago.

In addition, should Your Honor award any economic remedy, the affected Hospital(s) would suffer prejudice. The amount of nearly every economic remedy demanded by the General Counsel is considerable and, as

[2] The agency's rules and regulations do not appear to contemplate what would amount to interlocutory exceptions to Your Honor's rulings on the alleged unfair labor practices. See § 102.45(a).

each day goes by, the amount of the liability would increase by virtue of the compound interest that would apply under Kentucky River Medical Center, 365 NLRB No. 6 (2010). In the case of nearly every non-economic remedy, the delay would not only prejudice the affected Hospital(s), but also undermine the objectives that Congress hoped to achieve through the Act. The hearings on the single employer allegations and the corporate-wide remedy would substantially delay any final adjudication of the merits, and therefore, substantially delay the performance of any remedy that may ultimately be required of the Hospitals, such as the production of information to the Union, meetings and negotiations with the Union, or other activity that is part and parcel of the collective bargaining that the Act was designed to promote and preserve.

2.) CHS' Proposed Consent Order Is Reasonable Despite the Absence of a Corporate-Wide Remedy

In the Opposition, the General Counsel urges Your Honor to reject the Consent Order because neither CHS, Inc. nor CHSPSC has offered a corporate-wide remedy. See GC Opposition, page 12. In the process, the General Counsel overlooks the fact that USPS is no longer the law. Under Independent Stave, a party seeking to resolve an unfair labor practice allegation is not under any burden to offer each and every remedy that the General Counsel has pursued for the alleged violation. In the case here, for

a number of reasons, Your Honor should reject the General Counsel and the Union's protestations over the sufficiency of the proposed Consent Order.

As noted before, a corporate-wide remedy does not automatically follow a finding that a party has engaged in one or more unfair labor practice. To the contrary, the General Counsel must persuade Your Honor, through evidence and argument, that a corporate-wide remedy is needed in order to remedy the unfair labor practices. See GC Opposition, page 12. Matters do not end there, however, as the General Counsel would not be able to apply the remedy in any future case unless the General Counsel is able to satisfy further burdens of proof. Id. The corporate-wide remedy requested by the General Counsel, therefore, portends more than one layer of future, risky litigation, which, in the end, can offer only one guarantee: deep, ongoing depletions to the resources of private and public parties alike. Furthermore, for the numerous reasons explained by CHS' submissions to Your Honor, a corporate-wide remedy is not available in the case at hand.

A.) The General Counsel's Entitlement to the Remedy

In order for Your Honor to award a corporate-wide remedy, on top of a number of other necessary showings, the General Counsel would need to persuade Your Honor that the Hospitals have engaged in unfair labor practices and these violations have "impact[ed] employees at other

facilities." See GC Opposition, page 16. In the case before Your Honor, however, the General Counsel has not come forward with any sensible explanation as to how the Hospitals' alleged violations of the Act could affect the employees of any entity, let alone every entity that is owned by CHS, Inc. and serviced by CHSPSC. The fact the Hospitals are alleged to have engaged in substantially the same refusals to bargain (see GC Opposition, page 14) proves nothing in terms of the working conditions of employees who are outside the scope of the General Counsel's pleading. In addition, the fact that the General Counsel has challenged a solitary work rule at one facility hardly provides a bridge between employees of the hospitals here and employees of hospitals elsewhere. See GC Opposition, page 14. Notably, the General Counsel has not even alleged that the compliance policy is maintained by the other Hospitals in the litigation at hand, and even under the (shaky) presumption the General Counsel proves the policy as maintained by Barstow violated the Act, under The Boeing Company, 365 NLRB No. 154 (2017), the General Counsel would be required to prove the unlawfulness of the policy on a case-by-case, and more to the point, a facility-by-facility basis.

To be an appropriate remedy, a corporate-wide remedy must also be based upon evidence that violations arise from a corporate-wide labor

policy. See GC Opposition, pages 13. In essence, the General Counsel requests that Your Honor make a finding that a corporate-wide policy has already been proven, or at the very least, endorse the General Counsel's prediction that such a policy will be proven by the time the record closes. Id., pages 13 – 14. The Union, for its part, goes even further. Specifically, the Union argues that, in spite of the fact that no direct participation allegations are set forth by the Complaint, they will, nonetheless, be a part of some shadow litigation taking place before Your Honor, and naturally, the Union will prevail on the allegations. See Union Opposition, pages 1, 3. Evidently, the General Counsel and the Union have overlooked, or maybe choose not to accept, a simple truth that was observed by the Board in UPMC: "[l]itigation is never certain." 365 NLRB No. 153, slip op. *7. None of the Respondents have offered any evidence in defense of the General Counsel's theory that CHS controls the Hospitals' employee relations. The General Counsel and the Union's subjective assessments of the evidence and self-serving predictions should carry no weight as part of Your Honor's analysis under Independent Stave.[3]

[3] The General Counsel has also acknowledged that a corporate-wide remedy is not awarded unless the General Counsel is able to show a "clear pattern or practice of unlawful conduct." See GC Opposition, page 12. As shown by the Hospitals' response to the General Counsel's claim of recidivism, Your

B.) The Application of a Corporate-Wide Remedy in Future Cases

The litigation engendered by the General Counsel's request for a corporate-wide remedy would not be confined to the proceedings now before Your Honor. Instead, as made clear by the General Counsel's own Opposition, the remedy could not apply in any future case unless the General Counsel proved that a single employer relationship was in place between CHS, Inc. and / or CHSPSC and the local facility. See GC Opposition, page 12. The General Counsel's plan may be to rely upon a single employer finding by Judge Laws and / or Your Honor as a way to fast-track the litigation of single employer allegations in future cases. Aside from the fact the single employer allegations remain under dispute in the case before Judge Laws and the case before Your Honor, the high probability is that a single employer allegation in a future case will give rise to sizable litigation. Any effort by the General Counsel to apply the doctrine of *res judicata* would, itself, generate considerable litigation as any local facility that is involved in a future case would surely argue that they ought to have a full

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Honor has not been presented with any evidence of any pattern or practice of unlawful conduct. See page 17, *infra*.

and fair opportunity to defend against the allegation that they are in a single employer relationship with CHS, Inc. and / or CHSPSC.

The absence of a corporate-wide remedy in the case now before Your Honor would not, of course, affect the General Counsel's opportunity to pursue a remedy – any remedy – against the local facility in these future cases envisioned by the General Counsel and there is no reason to believe that the local facility would be unable or unwilling to perform the remedy. Though the Hospitals presume that Your Honor's focus would naturally be on the proceedings over which Your Honor presides, the Hospitals do urge Your Honor to consider the future litigation that could result from Your Honor's award of a corporate-wide remedy. The prospective conservation of resources, whether for the sake of private parties, an agency whose budget is the subject of ongoing reductions, or simply the U.S taxpayer, should be a legitimate, if not necessary point of consideration under Independent Stave, and as applied here, strongly weighs in favor of the approval of the Consent Order proposed by CHS.

3.) CHS' Reservation of Compliance Rights Is Reasonable

The General Counsel urges Your Honor to reject the Consent Order because CHS, Inc. and CHSPSC have reserved their rights to challenge, as part of any subsequent compliance proceedings, their ability to perform any

non-economic remedy that may be awarded in connection with a violation of the Act by a divested facility. Contrary to the General Counsel's contention, CHS' reservation of rights does not "**require**" any litigation. See GC Opposition, page 8 (emphasis added). In fact, the litigation contemplated by the General Counsel is a relatively remote possibility. Aside from the open question as to whether the General Counsel has proven any violation of the Act, the General Counsel has not presented Your Honor with any reason to believe that Affinity, Barstow or Watsonville would be unable to perform any remedy that is awarded for a violation of the Act.

The fact CHS, Inc. and CHSPSC have reserved their compliance rights is nearly a red herring in the context of whether the Consent Order should be approved under Independent Stave. The compliance litigation that is of concern to the General Counsel is only a possibility, and a relatively slim possibility, given the ability of any divested facility to perform on any remedy that may be awarded down the road.

4.) The Hospitals' "Recidivism"

By now, given the parties' previous exchanges on the question, the Hospitals can only describe the General Counsel's arguments on the Hospitals' supposed recidivism as completely disingenuous. In a previous submission to Judge Laws, one that supported CHS' original effort to obtain

a Consent Order in CHS 1.0, the Hospitals presented Judge Laws with the facts as they relate to the relatively few occasions on which the Board found one or another of the Hospitals to be in violation of the Act. See Respondent Hospitals' Reply to General Counsel's Opposition to CHS, Inc. and CHSPSC, LLC's Revised Motion to Adopt Modified Consent Order, a copy of which is attached hereto as "Exhibit A." For the most part, the Hospitals would respectfully refer Your Honor to their prior submission to Judge Laws, but also wish to reply to a few of the arguments set forth by the Opposition.

None of the cases summarized by the General Counsel (see GC Opposition, page 13, fn. 16) included even an allegation, let alone a finding that CHS, Inc. or CHSPSC was involved in the case in any way. Indeed, the General Counsel concedes that "there are no prior unfair labor practice findings against [CHS] directly related to these Respondent Hospitals." See GC Opposition, page 19. Nor is there, incidentally, any unfair labor practice finding against CHS, Inc. or CHSPSC related to any other entity. The fact is that, whereas unfair labor practice litigation between hospitals owned by CHS, Inc. and various labor organization goes back to at least 2003[4], with

[4] See Jackson Hospital Corp. d/b/a Kentucky River Medical Center, 340 NLRB 536 (2003).

General Counsels appointed by both political parties holding office during the ensuing years, the single employer theory was not pursued before (now-former) General Counsel Richard Griffin took office, and whether rightly or wrongly, plainly placed an emphasis on the prosecution of alleged unfair labor practices against large corporations (*e.g.*, McDonalds). In any case, for purposes of the Independent Stave analysis, any previous violation of the Act by any of the Hospitals is completely irrelevant. See UPMC, 365 NLRB No. 153, slip op. *10, fn. 13.

The General Counsel's contention of a "pervasive pattern of unlawful conduct" is also based upon the Orders that some U.S. District Courts have issued under Section 10(j) of the Act. See GC Opposition, page 13, fn. 16; page 16; see also Union Opposition, pages 5 – 6. Under Independent Stave, a 10(j) Order should carry virtually no probative value. Ironically enough, as part of the effort to obtain these Orders, the General Counsel emphasized that the role of the Court was **not** to adjudicate the merits of the alleged unfair labor practices and the Court should even refrain from resolving any factual dispute between the parties. Similarly, the Hospitals had no opportunity before the Court to question the people who signed affidavits in support of the General Counsel's request for a 10(j) Order. Indeed, in each case, the 10(j) Order was issued in the absence of any evidentiary hearing.

In addition, the Opposition conveniently omits the fact that the General Counsel's contention that the sky is falling on the Hospitals' employees has rung hollow before, specifically, in the case of Bluefield and Greenbrier, where both 10(j) petitions were denied by the U.S. District Court.[5]

Lastly, and as a prime example of the lengths to which the General Counsel will go to preserve the full scope of the litigation, the General Counsel argues that the Hospitals' recidivism is evidenced by the fact they are currently defending other allegations in other cases (*e.g.*, CHS 1.0). See GC Opposition, page 13, fn. 16. These other allegations, no matter how numerous or serious, are precisely that, allegations, and like the 10(j) Orders, deserve virtually no weight in terms of the assessment of whether the Consent Order is reasonable.

In the end, the General Counsel's hackneyed assertions as they relate to the Hospitals' "recidivism" only demonstrate that the zeal to prosecute has once more taken the place of good faith advocacy. The Hospitals respectfully urge Your Honor to conclude that the General Counsel and the Union have not shown any history of violations of the Act by which the Independent Stave analysis would lean in favor of ongoing litigation.

[5] The General Counsel responded to the dismissal of the 10(j) petitions with an appeal to the U.S. Court of Appeals for the Fourth Circuit, which has not yet issued its Decision.

CONCLUSION

For all the reasons set forth above, the Hospitals respectfully urge Your Honor to grant the Motion, enter the Consent Order and dismiss the related allegations.

Dated: Glastonbury, CT
April 4, 2018

Respectfully submitted,

/s/_____

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DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., HOSPITAL OF BARSTOW, INC., d/b/a BARSTOW COMMUNITY HOSPITAL, WATSONVILLE HOSPITAL CORPORATION d/b/a WATSONVILLE COMMUNITY HOSPITAL and / or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and / or joint employers and QUORUM HEALTH CORPORATION and QHCCS, LLC, successor employers and NATIONAL NURSES ORGANIZING COMMITTEE (NNOC), CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC) and CALIFORNIA NURSES ASSOCIATION (CNA), NATIONAL NURSES UNITED	08-CA-167313, *et al*.

CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that, on April 4, 2018, the document above was served upon the following *via* email:

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Dated: Glastonbury, CT
April 4, 2018

Respectfully submitted,

/s/_____

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EXHIBIT A

UNITED STATES OF AMERICA
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DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., and / or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and / or joint employers, *et al*. and CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (CNA / NNOC) and UNITED STEEL, PAPER AND FORESTRY RUBBER, MANUFACTURING, ENERGY ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	08-CA-117890, *et al*.

RESPONDENT HOSPITALS' REPLY TO GENERAL COUNSEL'S OPPOSITION TO CHS, INC. AND CHSPSC, LLC'S REVISED MOTION TO ADOPT MODIFIED CONSENT ORDER

As Respondents in the above-captioned cases, DHSC, LLC d/b/a Affinity Medical Center, Hospital of Barstow, Inc. d/b/a Barstow Community Hospital, Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center, Fallbrook Hospital Corporation formerly d/b/a Fallbrook Hospital, Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center and Watsonville Hospital Corporation d/b/a Watsonville Community Hospital (hereafter, collectively, the "Hospitals") hereby reply, by and

through the Undersigned Counsel, to the Opposition (hereafter, the "Opposition") filed by the General Counsel to the Revised Motion to Adopt Modified Consent Order (hereafter, the "Motion") filed by CHS, Inc. and CHSPSC, LLC.

In the Opposition, the General Counsel urges Your Honor to deny the Motion because the Order proposed by CHS, Inc. and CHSPSC, LLC does not provide for a corporate-wide cease and desist remedy. In large part, the General Counsel argues that such a remedy is appropriate because, supposedly, the Hospitals are "recidivist actors" with "an extensive history of pervasive unlawful conduct, and "flagrant disregard for Board decisions and court orders." See Opposition, page 11; see also page 14 ("General Counsel submits that a corporate-wide order is appropriate in the context of the recidivist history of the Respondent Hospitals"). The Hospitals respectfully request an opportunity to provide Your Honor with the actual history of unfair labor practices, as opposed to the hyperbolic version manufactured by the General Counsel.

As a preliminary matter, however, the Hospitals should address the Orders that have been issued by U.S. District Courts under Section 10(j) of the National Labor Relations Act, as amended (hereafter, the "Act"), as they

are used by the General Counsel for a delusory purpose.[1] In every one of these cases, the General Counsel stressed to the Court that the role of the Court was **not** to decide whether any unfair labor practice had, in fact, taken place. Instead, the role of the Court was only to decide whether there was "reasonable cause" for the General Counsel to believe that the given facility had violated the Act, and if so, whether the interim remedy available under Section 10(j) of the Act was necessary in order to preserve the ability of the Board to remedy any unfair labor practice later found by the Board to have actually taken place at the facility. As part of the ongoing effort to frustrate the ability of CHS, Inc. and CHSPSC, LLC to resolve the disputes before Your Honor, however, the General Counsel has presented the 10(j) Orders as evidence of the Hospitals' repeated violations of the Act, or in a word, their supposed "recidivism." The fact that the General Counsel previously urged

[1] In the case of Affinity, a 10(j) Order was entered by the U.S. District Court for the Northern District of Ohio on January 24, 2014 and expired with the issuance of the Board's related Decision and Order on April 30, 2015. Case No. 5:13-CV-01538 (JRA). In the case of Barstow, a 10(j) Order was entered by the U.S. District Court for the Central District of California on June 24, 2013 and expired with the issuance of the Board's related Decision and Order on August 29, 2014. Case No. 5:13-CV-00933 (CAS). A new 10(j) Order was entered by the same Court on August 29, 2016 and presently remains in place. Case No. 5:16-CV-01600 (CAS). In the case of Fallbrook, a 10(j) Order was entered by the U.S. District Court for the Southern District of California on June 7, 2013 and expired with the issuance of the Board's related Decision and Order on April 14, 2014. Case No. 3:13-CV-01159 (GPC).

the Courts to refrain from any review of the merits of the alleged unfair labor practices, but now presents the 10(j) Orders as effectively the final word on these disputes, exposes an argument that is far more contrived than convincing.

The Hospitals should also note that, even though the 10(j) Orders cover a collective period of time of roughly three and a half years, and in spite of the notion that the Hospitals have engaged in seemingly perpetual violations of the Act, the General Counsel has not once returned to any of these Courts and alleged any failure or refusal of the given facility to comply with the Order. In the end, therefore, the take away from the 10(j) proceedings is that the Hospitals respect and comply with the law.

The Hospitals now turn to the Decisions and Orders previously issued by the Board, which do not provide any basis to characterize any of the Hospitals as a "recidivist."

1.) Affinity Medical Center

Affinity is the subject of one, and only one, Decision and Order in which the Board determined that the Hospital violated the Act. In DHSC, LLC d/b/a Affinity Medical Center, 362 NLRB No. 78 (April 30, 2015), the Board determined that Affinity violated Section 8(a)(1) by virtue of statements made and actions taken by one of the Hospital's (former)

managers, and the exclusion of one of the Union's organizers from the Hospital's facility. The Board also determined that Affinity's termination of one employee, and a related report to the Board of Nursing in the State of Ohio, violated Section 8(a)(3) of the Act. Lastly, the Board found that Affinity's refusal to recognize and bargain with the Union, which was undertaken by the facility in order to challenge the Certification of Representative, violated Section 8(a)(5) of the Act. 362 NLRB No. 78, *19. In response to the Board's Decision and Order, on November 17, 2015, Affinity filed a Petition for Review with the U.S. Court of Appeals for the District of Columbia Circuit, which remains pending before the Court. See D.C. Cir. Case No. 15-1426.[2]

2.) Barstow Community Hospital

Like Affinity, Barstow is the subject of one, and only one, Decision and Order in which the Board determined that the Hospital violated the Act. Unlike Affinity, Barstow's violations were confined to Section 8(a)(5) of the Act. In Hospital of Barstow, Inc. d/b/a Barstow Community Hospital, 361 NLRB No. 34 (August 29, 2014), the Board determined that Barstow

[2] The proceedings before the Court of Appeals have been placed into abeyance, given the fact that the outcome of Affinity's challenge to the Certification of Representative will likely be determined by the outcome of Barstow's challenge to the Certification of Representative that covers its RNs, and is before the same Court. See footnote 3, *infra*.

violated Section 8(a)(5) of the Act by the refusal to make any proposals before the presentation of the Union's proposals, the declaration of an impasse because of the Union's refusal to cease distribution of "Assignment Despite Objection" forms, and changes to a policy related to RN education. 361 NLRB No. 34, *1-2. In response to the Board's Decision and Order, Barstow filed a Petition for Review with the U.S. Court of Appeals for the District of Columbia Circuit.[3]

3.) Bluefield Regional Medical Center

Here also, Bluefield is the subject of one, and only one, Decision and Order, which arises from the Hospital's challenge to the Certification of Representative that was issued in the Union's favor. In Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center, 361 NLRB No. 154 (December 16, 2014), the Board rejected Bluefield's challenge to the Certification of Representative and the other grounds on which the Hospital

[3] On April 29, 2016, the Court of Appeals vacated the Board's Decision and Order due to the Board's failure to review Barstow's challenge to the Certification of Representative on the merits. Hospital of Barstow, Inc. d/b/a Barstow Community Hospital v. NLRB, 820 F.3d 440. On July 15, 2016, the Board issued a Supplemental Decision and Order in which the panel validated the Certification of Representative and re-adopted the findings and conclusions set forth by the Decision and Order vacated by the Court of Appeals. 364 NLRB No. 52. The Supplemental Decision and Order is currently before the Court of Appeals by virtue of a new Petition for Review filed by Barstow. D.C. Cir. Case No. 16-1343.

had relied to decline to recognize and bargain with the Union.[4] Bluefield did not pursue any federal court review of the Board's rulings. Instead, the Hospital recognized the Union and offered dates for the commencement of the parties' negotiations. In the meantime, the Board pursued an Application for Enforcement, which was later granted by the U.S. Court of Appeals for the Fourth Circuit. See NLRB v. Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center, *et al*., 821 F.3d 534 (2016).

4.) Fallbrook Hospital

Once more, like the other Hospitals reviewed above, Fallbrook is the subject of one, and only one, Decision and Order issued by the Board. In Fallbrook Hospital Corporation d/b/a Fallbrook Hospital, 360 NLRB No. 73 (April 14, 2014), which was a case originally before Your Honor, the Board determined that Fallbrook had engaged in bad faith bargaining in connection with the parties' negotiations toward a collective bargaining agreement. The Board also determined that Fallbrook failed to bargain over, and failed to provide information related to, the termination of two employees. 360 NLRB No. 73, *15. In response to the Decision and Order, Fallbrook filed a

[4] Bluefield Hospital Company, LLC was a consolidated proceeding that also encompassed the challenges that Greenbrier Valley Medical Center had pursued in connection with the Certification of Representative issued in the Union's favor.

Petition for Review with the Court of Appeals (see D.C. Cir. Case No. 14-1056), but only as to the remedy awarded by the Board.

5.) Greenbrier Valley Medical Center

As noted above (see fn. 4), Bluefield Hospital Company, LLC, 361 NLRB No. 154, also encompassed Greenbrier's challenge to the Certification of Representative issued in the Union's favor as to the RNs employed by Greenbrier. The Board rejected Greenbrier's challenge and other arguments. Like Bluefield, in response to the Decision and Order, Greenbrier recognized the Union and offered dates for the commencement of the parties' negotiations. The Application for Enforcement referenced above, and the Decision later issued by the U.S. Court of Appeals for the Fourth Circuit, also covered Greenbrier.

Greenbrier was the subject of one other Decision and Order issued by the Board. In Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center, 360 NLRB No. 127 (May 29, 2014), the Board determined that Greenbrier violated Section 8(a)(3) of the Act by virtue of a performance improvement plan, written warning and schedule change related to a particular employee, namely Mr. James Blankenship. 360 NLRB No. 127, * 10. The Hospital did not pursue any federal court challenge, but rather, fully complied with the Board's Decision and Order. As confirmed by the

Board's e-docket, the case was closed nearly two years ago on account of the Hospital's compliance. See Case No. 10-CA-094646.

6.) Watsonville Community Hospital

Zero. That is the number of occasions on which the Board has found Watsonville, a facility with long-standing collective bargaining relationships with four (**4**) different labor organizations, in violation of the Act.[5]

* * *

In summary, any argument by the General Counsel that a sweeping corporate-wide remedy is necessary because of the Hospitals' avowed recidivism is, simply, a house of cards. Indeed, as noted just above, the argument is patently frivolous as to Watsonville. In the case of Bluefield, the argument borders upon the frivolous. As viewed through the fog of the General Counsel's advocacy, the action perceived by the General Counsel to violate the Act so egregiously was, in reality, merely the exercise of the Hospital's fundamental right to challenge the outcome of the election, which, as Your Honor surely knows, can only be pursued by a "technical" refusal to bargain. When the Board rejected the challenge, Bluefield

[5] Incidentally, though to a lesser degree, the same point should be made on behalf of Barstow in connection with the facility's collective bargaining relationship with SEIU United Healthcare Workers – West, which goes back to 2012. The Board has never found any unfair labor practices to have taken place as part of the relationship between Barstow and the SEIU.

recognized the Union and negotiations got underway. When, as part of the same case, the Board rejected the challenges pursued by Greenbrier, the Hospital responded in the very same way. Likewise, in response to the Board's findings related to Mr. Blankenship, the Hospital duly performed each and every remedy ordered by the Board. So much for the General Counsel's claim that the Hospitals have an "**extensive history**" of "**flagrant disregard for Board decisions**." See Opposition, page 11 (emphasis added).

In the case of Affinity, Barstow and Fallbrook, the history of unfair labor practices is undeniably shallow. In the particular case of Fallbrook, given the closure of the facility nearly two years ago, the General Counsel lacks a basis to put together any case of recidivism. Presumably, even the extremity of the General Counsel's position does not go so far as to imagine the ability of Fallbrook to violate the Act from the grave. In terms of Affinity and Barstow, as noted above, the Hospitals are the subject of one, and only one, Decision and Order issued by the Board, neither of which have been enforced by a Court of Appeals. Thus, aside from the fact that the Board does not follow a "one strike and you're out" approach toward recidivism, the General Counsel should not be allowed to define recidivism in a way that calls for predictions of the future (*i.e.*, favorable outcomes

before the Court of Appeals) on top of shamelessly revised versions of history.

Dated: Glastonbury, CT
November 2, 2016

Respectfully submitted,

/s/_____

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., and / or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and / or joint employers, *et al*. and CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (CNA / NNOC)	08-CA-117890, *et al*.

CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that, on November 2, 2016, the document above was served upon the following *via* email:

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